

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
WAYNE E. ANDERSON & ASSOCIATES,
INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
JACK BRENDER,

Respondents.

PCHB Nos. 81-76 & 81-77

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, two separate appeals of Washington State Department of Ecology Reports of Examination recommending permits be issued on Surface Water Application Nos. S4-26642 and S4-26057, were consolidated and came before the Pollution Control Hearings Board for formal hearing on April 7, 1982, in Lacey, Washington, and on May 12, 1982, in Yakima, Washington. Seated for and as the Board on April 7, 1982, were Gayle Rothrock (presiding), Nat Washington, Chairman, and David Akana, Member; on May 12, 1982, Gayle Rothrock, presiding, and

1 David Akana. The proceedings were recorded by Lois Fairfield and
2 Lynette Frieese.

3 Appellant was represented by his attorney, Jay Johnson of
4 Wenatchee. The respondents were represented by Richard Kirkby,
5 Assistant Attorney General for the Department of Ecology at Olympia;
6 Jack Brender, co-respondent, represented himself at hearing.

7 Witnesses were sworn and testified. Exhibits were admitted and
8 examined. Oral and written argument was taken into the record.
9 Unsuccessful post-hearing settlement negotiations were held by the
10 parties. From the testimony, evidence, and argument, the Board makes
11 these

12 FINDINGS OF FACT

13 I

14 This controversy centers around two applications for permits to
15 appropriate surface waters from the same source. Appellant appeals
16 the Department's approval of application No. S4-26057 in its
17 entirety. This application was submitted by respondent Jack Brender
18 on November 17, 1978. Appellant also challenges part of the
19 Department's approval of application No. S4-26642. This application
20 was submitted by the appellant on April 11, 1980. The appellant
21 believes his right is superior to that of the respondent permittee and
22 challenges the priority assigned to Brender's right.

23 II

24 The appellant and respondent seek to appropriate surface water
25 from the same two springs. These springs are located within

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1 Government Lots 4 and 5 of Section 2 T.24 N., R.17 E.W.M. Appellant
2 requested and received .13 cubic feet per second with a maximum of
3 16.5 acre-feet per year to be used continuously for community domestic
4 supply for 33 homes. A priority date of April 11, 1980, was assigned
5 to his right. Respondent requested .13 cubic feet per second for
6 continuous community domestic supply for 12 homes and irrigation of 10
7 acres. He ultimately received .12 cubic feet per second with a
8 maximum of 6 acre-feet per year and no water for irrigation.
9 Respondent's priority date is November 17, 1978.

10 III

11 Legal notice of appellant's and respondent's intent was properly
12 published in local newspapers. No protest was filed against
13 appellant's application. Appellant filed a formal protest against
14 respondent's application. His concern was that there was an
15 insufficient amount of water to satisfy both his and respondent's
16 needs.

17 IV

18 Respondent plans to develop a collection system at the two springs
19 and convey the water by gravity flow for delivery to 12 homes.
20 Appellant, on the other hand, has already developed the springs and
21 has plumbed them to a 30,000 gallon reservoir with a chlorinating
22 facility which already services 21 homes. A new system must be
23 designed to accommodate the instantaneous withdrawal effected by the
24 two Department orders.

25
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V

The combined yield of both springs is approximately 60 gallons per minute or .13 cubic feet per second and can produce 96 acre-feet of water per year. The water required for in-house domestic supply, based upon 100 gallons per person per day for a family of four is .5 acre-foot per year. The Department concluded that the springs could adequately supply both parties' demands throughout the entire year, provided that the water is not used for irrigation, lawns, or gardens.

VI

On June 30, 1974, appellant filed Water Right Claim No. 141578 under the Claims Registration Act, Chapter 90.14 RCW with the Department. The claim was for 200 gallons per minute and 24 acre-feet annually. The purposes for which the water could be used was domestic use for five homes and irrigation of five acres. The water was to come from one ground water source located approximately 800 feet away from each of the two springs. The date this water was first put to use, as stated in the claim, was 1930.

VII

In 1975, appellant contacted the Spokane Regional Office for the Department of Social and Health Services concerning the development of his land. The district engineer approved a project for 33 dwelling places to be serviced with water from the two springs in controversy. Subsequent to the approval, appellant installed the water system that is presently being utilized without any further authorization.

VIII

There are no state-granted permit water appropriation applications that pre-date respondent's application.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and the subject matter of this proceeding. RCW 43.21B.

II

This matter has come before this Board to determine the priority of rights between two surface water appropriators authorized to divert water from the same source.

The legislature has found that, subject to existing rights, all waters within the state belong to the public and any right thereto shall be acquired by appropriation for a beneficial use and in the manner provided and not otherwise. As between appropriators, the first in time shall be the first in right. RCW 90.03.010.

III

Any water right which can be proven to have existed before the enactment of the 1917 water code is exempt from the permitting process of Chapter 90.03 RCW and would have priority as against all subsequent

1 claims. The burden of proof is on the claimant to establish that a
2 water right appurtenant to his or her land existed before 1917.

3 The legislature adopted the Claims Registration Act, Chapter 90.14
4 RCW, to provide a means by which a water user could document those
5 uses that began prior to the enactment of the State Water Code (Ch.
6 90.03 RCW). The filing of a claim does not confirm any right to use
7 the water. RCW 90.14.043(6). Any person claiming a right to withdraw
8 water who fails to file a statement of claim is deemed to have waived
9 and relinquished any right, title or interest in said right. RCW
10 90.14.071.

11 The legislature has further provided that the filing of a
12 statement of claim does not constitute an adjudication of any claim.
The claim can be used as prima facie evidence in a general
14 adjudication if certain conditions are met. RCW 90.14.081.
15 Respondent DOE and the Board must make tentative evaluations of such
16 claims where existing rights evidenced by the claim are asserted.

17 Appellant filed Claim No. 141578 but has failed to establish
18 through the claim that his right to divert and withdraw .13 cubic feet
19 per second from the two springs in question began prior to 1917.
20 Because the use did not start prior to 1917, the water that the
21 appellant believed to be his to appropriate and did, in fact,
22 appropriate and beneficially use, was, in fact, subject to
23 appropriation by anyone so inclined to apply for a permit.

24 IV

25 Since the adoption of the State Water Code, the only means of

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1 acquiring a right to develop and use surface water is to apply for and
2 receive a permit from the State. Final determination of the extent
3 and validity of any right associated with a claim registered under
4 Chapter 90.14 RCW lies with the Superior Court through the general
5 adjudication process. Water rights can therefore be acquired before
6 1917 under common law, by permit, or through a general adjudication.

7 V

8 Respondent Brender filed his permit before the appellant and
9 therefore has priority to the water in times of shortage. As between
10 appropriators, first in time shall be first in right. RCW 90.03.010.

11 VI

12 Any Finding of Fact which should be deemed a Conclusion of Law is
13 hereby adopted as such.

14 From these Conclusions the Board enters this
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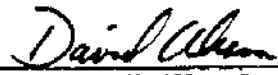
ORDER

The Washington State Department of Ecology Orders approving Application Nos. S4-26057 and S4-26642 for permits to appropriate public waters are hereby affirmed.

DONE this 1st day of April, 1983, at Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Chairman


DAVID AKANA, Lawyer Member

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